SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

New York City Parents Union, et al.

INDEX NO. 108538/2011E

MOTION DATE

-v-

The Board of Education of the City School District of the City of New York, et al.

MOTION SEQ. NO. 001

The papers considered on this motion ~~(and cross motion)~~ are enumerated in the attached decision/order.

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ORDERED that this motion (☑ ~~and cross motion~~) is (~~are~~) decided in accordance with the annexed decision and order.

Dated: 12/28/11

J.S.C.

1. Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER/JUDGMENT ☐ SUBMIT ORDER/JUDGMENT
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT
☐ REFERENCE
☑ PC/CC 2/1/12 2:15pm

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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NEW YORK CITY PARENTS UNION, CLASS SIZE MATTERS, NEW YORK COMMUNITIES FOR CHANGE, and LEONIE HAIMSON, NOAH GOTBAUM, STEPHANIE FIELDS, LASHAWN CHERRY, JACQUELINE PEREZ, CHRIS MOSS, AMANDA JACOBS, REGINA TIMBER, JERMAINE BLIGEN, NATASHA HOOPER, CHERYL AND ANGELA BLUE, SHARLENE HALE HALL, AMANDA COLON, ANGELA BALTIMORE, SANDRA E. HARPER, CYNTHIA GRIFFIN, HELENA CLAY, SONYA HAMPTON, ELLIOT WOFSE, HENRY CLEMENTE, YVONE WALKER, CYNTHIA BONANO, FAYE HODGE, and MUBA YAROFULANI, on Behalf of Their Children and Others Similarly Situated,

Plaintiffs,

Index No. 108538/11

Mot. Seq. No. 001

- against -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, andDENNIS M. WALCOTT, as Chancellor of theCity School District of the City of New York,

Defendants,

- and -

HARLEM SUCCESS ACADEMY CHARTER SCHOOL 1, HARLEM SUCCESS ACADEMY CHARTER SCHOOL 4, OCEAN HILL COLLEGIATE CHARTER SCHOOL, SUMMIT ACADEMY CHARTER SCHOOL, DEMOCRACY PREPARATORY CHARTER SCHOOL, NEW VISIONS CHARTER HIGH SCHOOL FOR HUMANITIES, NEW VISIONS CHARTER HIGH SCHOOL FOR ADVANCED MATH AND SCIENCE, TEACHING FIRMS OF AMERICA CHARTER SCHOOL, INVICTUS PREPARATORY CHARTER SCHOOL, SUMMIT ACADEMY CHARTER SCHOOL, DREAM CHARTER SCHOOL, BROOKLYN CHARTER SCHOOL, INWOOD ACADEMY FOR LEADERSHIP CHARTER SCHOOL, LA CIMA ELEMENTARY CHARTER SCHOOL, CONEY ISLAND PREPARATORY CHARTER SCHOOL, SOUTH BRONX CLASSICAL CHARTER SCHOOL, GIRLS PREPARATORY CHARTER SCHOOL, and NEW YORK CITY CHARTER SCHOOL CENTER,

Intervenor-Defendants.

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APPEARANCES:

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Papers considered on review of this motion for a preliminary injunction:

PAPERS	E-FILING DOCUMENT NOS.
Summons & Complaint, Signed Order to Show Cause	2, 3
Aff. of Arthur Z. Schwartz, Aff. of Leonie Haimson, Exs. A - E in Support	*
Answer, Aff. of Service	4, 5
Defendants' Affs. in Opposition,	7,8,9
Stipulated Order of Intervention	**
Intervenor-Defendants; Affs., Exhibits and Memorandum in Opposition	10, 10-1 through 10-4, 11
Plaintiffs' Reply Memorandum of Law in Support	*
Transcript of September 15, 2011 Oral Argument	**

* and ** Hard copy versions of these papers were filed with the Part 12 clerk and considered by the court. However, plaintiffs are directed to upload into the NYSCEFS within 10 days of entry of this order those documents followed by a single * and the intervenor-defendants are directed to upload those documents followed by a double **. The documents should be tagged as relating to motion sequence 001. As the signed OSC makes clear, because this is an e-filed matter, New York County protocol requires counsel to upload all supporting papers to NYSCEF system. Failing to do so results in an incomplete official record in the County Clerk's file, as the County Clerk does not retain paper copies of documents in e-filed cases. Questions regarding e-filing should be addressed to 646-386-3610 or newyorkef@courts.state.ny.us.

PAUL G. FEINMAN, J.:

In this action seeking a declaratory judgment and injunctive relief, individual parents of public school children, and organizations concerned with furthering the interests of these children, move, by

order to show cause, for a preliminary injunction enjoining Defendant Board of Education of the City School District of the City of New York (BOE) from "failing to collect the proper rent and cost of charter schools using public school buildings" (Aff. of Leonie Haimson, at 4), allegedly causing a loss in opportunities for public school children. The amount plaintiffs seek to obtain for the coffers of the BOE exceeds $100 million.

The issues associated with the co-location of public charter schools in existing school facilities has been discussed by this court in some detail in recent decisions, and some familiarity with those issues is presumed.

It is apparently the custom in New York City for the BOE to give space in public school buildings to charter schools for no cost. This practice has continued since at least 2003. Plaintiffs argue that, under Education Law § 2853 (4) (c), the BOE is required to obtain from each charter school, as a form of rent, the "cost" of maintaining each charter school pupil in the public school building. Education Law § 2853 (4) (c) provides that "[a] charter school may contract with a school district ... for the use of a school building and grounds, the operation and maintenance thereof. Any such contract shall provide for such services and facilities at cost." Thus, plaintiffs claim that the BOE has failed to collect substantial sums from the charter schools which have been co-located in public schools, to the detriment of plaintiffs' children's education. Specifically, plaintiffs argue that the monies BOE has failed to obtain from the charter schools for many years, and at the present time, could go to the hiring, or retention of, teachers in the public schools, and that plaintiffs have been irreparably harmed by the BOE's failure to collect what is essentially rent from the charter schools.

The center of defendants' argument is that they have chosen not to contract with any charter school under Education Law § 2853 (4) (c), but has, instead, merely given the charter schools the

space, and so the charter schools need not pay "costs" to the BOE. BOE also argues that plaintiffs do not have standing to bring this proceeding, and have failed to meet the standards for a preliminary injunction.[1]

The requirements for obtaining a preliminary injunction are well-known: a likelihood of success on the merits; irreparable injury: and equities that balance in favor of the injunction. *Aetna Insurance Company v Capasso*, 75 NY2d 860 (1990); *Mabry v Neighborhood Defender Service, Inc.*, ___ AD3d ___, 2011 NY Slip Op 07172 (1st Dept 2011). A preliminary injunction will not be granted if any one element of this three-part test is not satisfied. *Public Fuel Service, Inc. v City of New York*, 92 AD2d 451 (1st Dept 1983).

In the case at bar, a preliminary injunction is not warranted. As explained below, plaintiffs have not shown irreparable harm, and the equities do not balance in their favor. In addition, the remedy plaintiffs seek on an interim basis is also the ultimate relief sought in the action, militating against preliminary injunctive relief.

Initially, the court notes that, while it is true that a preliminary injunction will not be available where money damages will suffice, *Rowland v Dushin*, 82 AD3d 738 (2d Dept 2011), plaintiffs herein are not seeking a money judgment. Rather, they are seeking a return to the BOE of monies they believe are owed to it, and the benefit they believe will be bestowed on their children as a result. Therefore, the remedy sought does not necessarily bode against a preliminary injunction.

Plaintiffs have waited years before bringing this petition, as the BOE has acted in the same manner vis-à-vis the charter schools for many years. Such delay is not conducive to preliminary

[1] No cross motion to dismiss based on plaintiffs' lack of standing was filed. Therefore, the court does not address that issue.

relief, as "[t]he delay in seeking a remedy in any forum for [an extended period of time] militates against [plaintiffs'] claim that immediate injunctive relief is imperative." *61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 342 (1st Dept 2010), *affd as mod* 16 NY3d 822 (2011).

More notable, however, is the fact that plaintiffs' harm is speculative. While $100 million is no small sum, particularly in dire budgetary times, apparently this represents but a small part of the BOE's budget, and there is no guarantee at all that any part of such sum, if returned to the BOE, would manifest itself in more teachers for the public schools plaintiffs represent (or for any public school), as plaintiffs claim. Speculative damages cannot support a preliminary injunction. *See GFI Securities, LLC v Tradition Asiel Securities, Inc.*, 61 AD3d 586 (1st Dept 2009); *Valentine v Schembri*, 212 AD2d 371 (1st Dept 1995).

The relief sought, although worded as a prohibition against the BOE from "renting space in a public school to any charter school and providing such services in such school at anything less than actual cost, and from failing to collect proper rent" is really, despite its wording, an affirmative injunction to collect proper rent. It is settled law that "[a] mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite [interior quotation marks and citation omitted]." *St. Paul Fire and Marine Insurance Co. v York Claims Service, Inc.*, 308 AD2d 347, 349 (1st Dept 2003). Should the BOE be required to start charging its charter schools "costs" at this time, and extract from them some manner of back rents, as plaintiffs demand, plaintiffs would be receiving the ultimate relief they seek at great harm to the status quo.

Finally, as suggested above, giving plaintiffs their ultimate relief at this early juncture in the litigation would tip the equities seriously out of balance. The numerous charter schools involved

cater to a large population of students who would be greatly harmed by any extraction of funds from their budgets already in place for the current academic year. It would be extremely harmful to wrench charter school students from their choice of school during a school year, should any charter school be unable to pay for renting public school space, forcing these students to seek placements elsewhere.

As a result of the foregoing, plaintiffs have failed to show a right to a preliminary injunction. However, the court's finding that a preliminary injunction is not warranted at this stage of the proceeding should not be misinterpreted as a finding that the court has evaluated the merits of the parties' contrasting readings of Education Law § 2853 (4) (3) and favors the BOE's interpretation. Indeed, in planning its future budgets, neither the BOE nor Intervenor-Defendants should rely on this decision as standing for the proposition that the court accepts their reading of the Education Law that if the BOE "gives" the charter school space there is no duty to pay "costs." Rather, given the impediments to an injunction outlined above, there is simply no cause to reach the merits of the action in order to resolve the particular motion before the court.

Accordingly, it is

ORDERED that the motion for a preliminary injunction is denied; and it is further

ORDERED that this matter is set down for a preliminary conference on February 1, 2012 at 2:15 p.m. in Part 12, 60 Centre Street, Room 212, New York NY 10007.

Dated: December 28, 2011
New York, New York

Paul G. Feinman
J.S.C.

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